

FEDERAL COURT.

Edgar Joseph Jr. for the appellants.*V. C. George* for the respondents.

Ong C.J.: The issue raised in this appeal and cross-appeal is a simple one. The appellants contracted to carry out certain civil engineering works for the respondents who are property developers. Payments therefor were to be made within 14 days from the delivery of certificates issued from time to time by the engineers appointed by the respondents. Between February 1969 and November 1970 a total sum of \$1,190,165.17 was certified as due and payable pursuant to the agreements between the parties. Part payment only to the extent of \$330,000 had been made, and judgment in this action was duly entered against the respondents for the balance of \$860,165.17. Leave to defend was granted as to the claim for interest — at the rate of 10.8 per cent. per annum — which the respondents disputed. The trial judge allowed the claim, at the rate of 5 per cent. simple interest on all sums certified due but not paid within 14 days thereafter.

In this appeal the appellants contend that interest at 10.8 per cent. should have been awarded, or some other reasonable rate above 5 per cent. The respondents' contention is that, upon his finding of fact that no definite rate of interest had been agreed upon, the learned trial judge was in error by awarding interest at 5 per cent. by virtue of illustration (n) of section 74 of the Contracts (Malay States) Ordinance 1950, whereby the appellants were not entitled to any interest whatsoever.

In my view there clearly was evidence of the appellants' forbearance to sue upon the certificates for a considerable time — such forbearance being in consideration of "an agreement to pay interest on overdue payments". The learned trial judge had found as a fact that the respondents admitted liability to pay interest, but that no specific agreement had been reached as to the rate of interest to be charged. In the absence of such agreement, therefore, he was of the opinion that the appellants were only entitled to a reasonable rate — namely 5 per cent., being the income they would have had by the use of their moneys if paid on time — because they were under no obligation to finance the respondents' property development and were entitled to stop all further work when progress payments remained unpaid by the respondents in breach of contract.

With respect, I think there was evidence on the record to justify the inference that the respondents' managing director did agree to reimburse the appellants the interest payments they had to make on their bank overdraft and their loan from the Finance Company. The specific rate certainly appears to have been agreed — and in writing by the letters of April 22, 1969 and December 31, 1969. The debit notes claiming interest at such stated rate were never challenged or disputed. In the circumstances, I am of opinion that the learned judge ought not to have substituted for the agreed rate of interest another rate based simply on what the unpaid moneys would have earned as income — upon which no evidence at all was offered as to prevailing rates of interest payable by banks or

A finance companies on fixed deposits. Since the intent of the parties was to indemnify the appellants at the agreed rate of 0.9 per cent. per month or 10.8 per cent. per annum, then it seems to me that no other rate can be substituted in the exercise of the court's discretion.

B I would therefore allow the appeal, and dismiss the cross-appeal, with costs. The order of the court below will be varied by substituting for 5 per cent. the higher rate of 10.8 per cent. per annum, but, in the circumstances, without monthly rests, to be determined (failing agreement between the parties) on enquiry by the Senior Assistant Registrar, following the directions given by the trial judge that each payment to account be considered as payment towards the certificates in successive order of time and the interest calculated on each certificate from the date due for payment thereof. For saving time and costs, it is hoped that the parties will be able to agree on a reasonable figure by way of an amicable settlement.

C **Ali and Ong Hock Sim FJJ.** concurred.

D

Appeal allowed.

Solicitors: *Joseph & Son; Ng Ek Teong & Partners.*

E

C. MOHAMMAD v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Agil Barakbah J.) October 31, 1973]

{Alor Star — Criminal Appeal No. 18 of 1973}

F *Price Control Act, 1946 (Act 121) — Charge of failure to affix labels to goods — No order requiring retailers to affix such labels — Price Control (Indication of Grade and Prices) Order, 1967.*

Criminal Law and Procedure — Charge — Defective — Criminal Procedure Code (F.M.S. Cap. 6), ss. 156, 325(i) & 422.

G In this case the appellant had been convicted on a charge of failing to affix labels or tags indicating the grades and prices of textiles. It was argued that the charge on which the accused was convicted was defective as there was no order under the Price Control Ordinance requiring retailers to affix tags or labels to any goods or classes of goods.

Held: as the charge in this case was defective the conviction must be quashed.

Cases referred to:-

(1) *Tan Cheng Kooi & Anor. v. Public Prosecutor* [1972] 2 M.L.J. 115 at p. 116.

(2) *Lee Swee Tee v. Public Prosecutor* [1960] M.L.J. 161.

H

CRIMINAL APPEAL.

Karpal Singh for the appellant.

Yap Cheng Boon (Deputy Public Prosecutor) for the respondent.

I

Syed Agil Barakbah J. (delivering oral judgment): This is an appeal against the decision of the learned President of the Sessions Court who convicted the appellant for "failing to affix labels or tags indicating the grades and prices to the following articles offered for sale", to wit, textiles under section 22(1) of the Price Control Ordinance, No. 26 of 1946. The appellant was sentenced to a fine of \$2,000 in default

six months' imprisonment and the textiles were ordered to be forfeited.

Mr. Karpal Singh for the appellant submitted a preliminary issue on the point of law pertaining to the charge with a view to asking this court to exercise its powers of revision under section 325(i) of the Criminal Procedure Code on the ground that the charge as it stands is defective.

Section 13(1) of the Price Control Ordinance, 1946, (now the Price Control Act, 1946) gives power to the Price Controller with the approval of the Minister to make an order published in the *Gazette* for the purpose of the control of goods or classes of goods, and under sub-section (d) power is given to "prescribe marks or labels to be affixed by retailers to any goods or classes of goods or containers thereof indicating the quality, grade, price or place of origin of the goods." An order was made by the Controller under this section and published in the *Gazette*, vide P.U. 271 known as the Price Control (Indication of Grade and Prices) Order, 1967, which came into force on 15 June 1967. The relevant rule, i.e. Rule 2(1), states as follows:—

"Every retailer of the articles mentioned in the Schedule here-to shall affix labels or tags on the bags or containers of such articles offered for sale which are displayed in that part of the premises of the retailer to which the public have access indicating the grade and price of such articles."

Subsequently two further orders were gazetted in which the schedule was amended by adding other goods including textiles and ready-made garments. (P.U.(A) 512 dated 11 December 1969 and P.U.(A) 282 dated 7 September 1972).

The first order was referred to in the two subsequent orders as the "Principal Order" which is still in force. Rule 2(1) of the Principal Order on close scrutiny does not require labels or tags to be affixed to the goods or classes of goods but only to bags or containers of articles which are offered for sale and displayed in the premises of the retailer to which the public have access indicating the grade and price of such articles. Although section 13(1)(d) of the Act gives such power to the Price Controller, it seems to me that such provision does not appear in the said order. There appears to be no subsequent order published in the *Gazette* for this purpose. The position is that there is no order requiring retailers to affix tags or labels to any goods or classes of goods.

It is conceded by the learned Deputy Public Prosecutor that the charge as it stands is defective. However, he submitted that the appellant has not been misled by such error or omission because he was defended by counsel in the court below and no such objection was raised. He urged the court to take into consideration the provisions of sections 156 and 422 of the Criminal Procedure Code. He submitted that the appellant was in fact not misled by such error or omission and there was no failure of justice. The charge, he submitted, should be amended to the failure to affix labels or tags to the containers on which the textiles were placed.

A question arises as to whether the table on which the said articles were placed can be termed as "container" within the context of section 13 of the Act. It

is not necessary for me to labour on this interpretation because the main question that arises now is whether an amendment to the charge can be made at this stage, assuming that I agree with the submission of the learned Deputy Public Prosecutor. In this connection I hold that it is too late since the charge in the court below as framed disclosed no offence known to law. (See *Tan Cheng Kooi & Anor. v. Public Prosecutor*⁽¹⁾). Failure to affix any labels or tags on any goods or classes of goods which are displayed in the retailer's premises to which the public has access is not an offence because there has not been any order published in the *Gazette* making it an offence under section 13(1) of the Act. I say it is too late because the provisions of the Criminal Procedure Code require that before a charge can be amended such amendment should be read and explained to the accused who should then be called upon to plead to the charge as amended and be accorded the right to recall any prosecution witness for cross-examination. (See *Lee Swee Tee v. Public Prosecutor*⁽²⁾). Since the charge does not disclose any offence known to law, it is not necessary nor desirable for me to consider the provisions of the Criminal Procedure Code as urged by the learned Deputy Public Prosecutor because there is an apparent miscarriage of justice.

In the circumstances I have no alternative but to hold that the trial and conviction in this case was a nullity and therefore the conviction must accordingly be quashed. The fine, if paid, must be refunded and the goods forfeited returned to the appellant.

Conviction quashed.

Solicitors: *Karpal Singh, Wong & Co.*

SAYAH BIN MUHAMMAD & ORS. v. GOVERNMENT OF MALAYSIA

[O.C.J. (Syed Agil Barakbah J.) November 3, 1973]
[Alor Star — Civil Suit No. 170 of 1972]

Contract — Contract of employment as teachers by Government — Alleged breach of — Whether contract entered into or in execution of any public duty or authority — Whether action by teachers for salaries etc. barred — Public Authorities Protection Ordinance, 1948.

The plaintiffs applied for a declaration that they were entitled to be paid salaries and allowances in accordance with the scale for certificated Vernacular School Teachers and for repayment of deductions made from their salaries. The defendants, the Government of Malaysia, applied for an order that the proceedings be set aside on the ground that the action was not commenced within twelve months of the alleged act as required by section 2 of the Public Authorities Protection Ordinance, 1948.

Held: the relationship of the plaintiffs with the Government in this case was purely contractual and therefore the claim was not barred by the Public Authorities Protection Ordinance, 1948.

Cases referred to:-

- (1) *Government of Malaysia v. Lee Hock Ning* [1973] 2 M.L.J. 51.
- (2) *Milford Docks Co. v. Milford Haven U.D.C.* (1901) 65 J.P. 483.
- (3) *Bradford Corporation v. Myers* [1916] A.C. 242.